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No. 99-

991719 APR 26 2000

IN THE

Supreme Court of the United States

PARACELSUS HEALTHCARE CORPORATION,
Petitioner,

v.

CAROLYN WILLARD and BETTIE SUE SUMNER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court's decision in this case, like its decisions in other recent cases, so disregards the requirements of the Due Process Clause of the Fourteenth Amendment, as set forth in this Court's decision in *BMW of North America v. Gore*, 517 U.S. 559 (1996), as to call for corrective action by this Court?

2. Whether an appellate court, in reviewing the constitutionality of a punitive damages award, applies a *de novo* standard of review, as the Third and Eighth Circuits and the Oregon Supreme Court have held, or a deferential standard of review, as the Second, Seventh and Ninth Circuits and several state supreme courts have held?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The following were parties to the proceeding in the Mississippi Supreme Court: Paracelsus Healthcare Corporation, Carolyn Willard, and Bettie Sue Sumner.

Petitioner Paracelsus Healthcare Corporation is a publicly-traded entity. Park-Hospital GmbH and Paracelsus-Kliniken-Deutschland GmbH each own more than 10% of Petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Paracelsus Healthcare Corporation respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court (App., *infra*, 1a-23a) is not yet published, but is available at 1999 WL 1000697 (Miss. Nov. 4, 1999). The order denying Petitioner's timely motion for rehearing (App., *infra*, 42a-44a), and the opinion of the Circuit Court of Tate County, Mississippi denying Petitioner's Motions for Judgments Notwithstanding the Verdicts or for New Trials or Remittiturs (App., *infra*, 37a-41a), are unreported. A prior opinion of the Mississippi Supreme Court in the same case (App., *infra*, 24a-36a) is reported at 681 So. 2d 539 (Miss. 1996).

JURISDICTION

The Mississippi Supreme Court issued its decision on November 4, 1999. The court denied Petitioner's timely motion for rehearing on January 27, 2000. (App., *infra*, 37a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOKED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

In these consolidated cases, the Mississippi Supreme Court sustained a $3 million punitive damages award, equal to 150 and 43 times actual damages, even though: (1) Petitioner's action was lawful at the time it occurred (and,

accordingly, had never been subject to punitive damages or any other civil or criminal sanctions); (2) the action was a one-time occurrence; and (3) the harm to the Respondents was wholly economic and not difficult to detect or measure. The Mississippi Supreme Court's decision continued a pattern of recent decisions in which that court disregards this Court's decision in *BMW of North America v. Gore*, 517 U.S. 559 (1996).

1. *The Discharge of Willard and Sumner.* This dispute arises from the discharge of two employees of Senatobia Community Hospital, a wholly owned subsidiary of Petitioner: Carolyn Willard, an accounts payable clerk and later business office manager, (Tr. 294), and Bettie Sue Sumner, an administrative secretary, (Tr. 375).[1]

In July of 1990, Willard discovered that several checks listed on the hospital's monthly bank statements were not recorded in the check ledger. (Tr. 309.) These checks reimbursed Carolyn Revel, a hospital administrator, for job-related expenses. (Tr. 313, 668.) Two of the checks contained Bettie Sue Sumner's signature, though Sumner denied signing them. (Tr. 394-95.)

Willard and Sumner reported this discovery to Revel and Pete Mistr, the regional chief financial officer. (Tr. 315.) Paracelsus subsequently conducted an investigation. (Tr. 667.) During the course of the investigation, Revel reimbursed the hospital for several checks to avoid any appearance of impropriety. (Tr. 583.) Paracelsus ultimately determined that the checks issued to Revel were for legitimate expenses incurred during the performance of her job. (Tr. 666, 668.)

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[1] "Tr." refers to the trial transcript; "R." refers to the record on appeal.

At trial, Paracelsus presented evidence that Willard and Sumner were discharged for reasons unrelated to the investigation of Revel. Willard became insubordinate, and this behavior had a negative impact on her ability to perform her responsibilities as business office manager. (Tr. 656-58.) The Accounts Payable Department was in disarray to such a degree that taxes were not being paid when due. (Tr. 319.) Sumner misrepresented her authority to a patient requesting emergency room care and then tried to prevent the patient from reporting the event to hospital administrators. (Tr. 661, 704-05.) Sumner also breached her duty of confidentiality with regard to information obtained in her capacity as administrative secretary, by reading Revel's mail and transcribing tapes of hospital board meetings. (Tr. 701.)

2. *The First Actions by Willard and Sumner, and the First Appeal to the Mississippi Supreme Court.* Willard and Sumner brought separate actions in the Tate County Circuit Court, asserting that they had been discharged in retaliation for reporting alleged defalcations by Revel. (Tr. 233.) The Respondents claimed that the terminations violated policies set out in an employee handbook implemented by a previous operator of the hospital (Tr. 233, 698) and that Petitioner's failure to follow the policies in the handbook constituted a breach of contract. (Tr. 233.) In separate trials, juries found that Petitioner did not follow the handbook when it dismissed Willard and Sumner. (Tr. at 699.) Both trial judges denied requested instructions on punitive damages, and both juries found that Petitioner was not liable for intentional infliction of emotional distress. Willard and Sumner were awarded back pay of $10,000 and $35,102, respectively, and Petitioner satisfied these judgments in full.

Respondents appealed to the Mississippi Supreme Court, contending that the juries should have received an instruction on retaliatory discharge, should have been allowed to consider whether Petitioner committed tortious breach of

contract, and should have been given a punitive damages instruction as to each of those claims.

The Mississippi Supreme Court in *Paracelsus I* (App., *infra*, 24a) reversed and remanded for a new trial to determine: (1) whether an instruction on retaliatory discharge should have been given; (2) whether an instruction on tortious breach of contract should have been given; and (3) whether a punitive damages instruction should be given with regard to the claims for retaliatory discharge or tortious breach of contract. As the court made clear, Mississippi law previously had not recognized a punitive damages claim for retaliatory discharge. *See* App., *infra*, 28a-29a.

3. *The Second Trial and Imposition of $3 Million in Punitive Damages Against Petitioner.* On remand, the two cases were consolidated for trial, which was restricted to the issue of punitive damages. The jury returned a verdict for Respondents, awarding them $1.5 million each, for a total of $3 million in punitive damages. (R. 301, 303.) The trial court denied Petitioner's motions for judgment notwithstanding the verdicts and remittitur, which challenged the punitive damages award as excessive under state law and the federal Constitution. (App., *infra*, 37a; R. 305, 430-34.)

4. *The Second Appeal to the Mississippi Supreme Court.* Petitioner renewed its challenges to the punitive damages award on appeal, and a divided Mississippi Supreme Court affirmed. (App., *infra*, 1a-23a.)

The court held that the punitive damages award was appropriate under Mississippi common law, based on Mississippi's new public policy prohibiting retaliatory terminations, (*id.* at 11a-12a.), which Mississippi did not

recognize until 1993, almost three years after Willard and Sumner were terminated, (*id.* at 16a-18a).[2]

The court then recited the federal constitutional guideposts set forth in *BMW*. (*Id.* at 13a.) It noted that under the first *BMW* guidepost, "damages imposed should reflect the enormity of the offense." (*Id.*) The court observed that "[t]here is no evidence that Paracelsus consistently engaged in the practice of firing its employees for reporting alleged illegal acts, and from all accounts, this was a one-time occurrence." (*Id.*) Despite this exculpatory finding, the court noted that some of the documentation relating to the checks was missing, and that the jury could "infer … whether there was any concealment of documentation by Paracelsus." (*Id.* at 13a-14a.)

As to the second *BMW* guidepost, the court acknowledged that a higher ratio between punitive and actual damages may be permissible where the injury is difficult to measure or where the plaintiffs suffered non-economic harm, (*id.* at 14a), but then held that "[i]n this case, there were no non-economic damages that were difficult to determine, and there was no injury which was hard to detect. The harm inflicted to Willard and Sumner was purely economic in nature, and both women were easily able to obtain other employment." (*Id.* at 14a.) The court recognized that the ratios of punitive damages to actual damages were "high," but stated that they were "far less than that found to be excessive in *BMW*." (*Id.*)

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[2] Petitioner contended that the jury should have been instructed to award punitive damages under Miss. Code Ann. § 11-1-65 (Supp. 1999), the state punitive damage statute intended to limit punitive damage awards in tort cases to a reasonable amount. The court held that retaliatory discharge is a contract action, and therefore not subject to the statute.

As to the third *BMW* guidepost, the court acknowledged that "there are no other [civil or criminal] sanctions which would be imposed under the facts of this case." (*Id.* at 14a.)

Two justices dissented. (App., *infra*, 21a-23a.) The dissenting justices concluded that a $3 million punishment was grossly excessive under *BMW* because Petitioner did not engage in the type of egregious conduct warranting a $3 million punishment. (*Id.* at 22a.) The dissent pointed out the absence of any reckless or reprehensible conduct by Petitioner, and emphasized the majority's finding that the conduct was an isolated occurrence. (*Id.*) The dissent also noted that Respondents suffered purely economic harm, readily obtained other employment, and were adequately compensated for their injuries by the actual damage awards. (*Id.*)

REASONS FOR GRANTING THE PETITION

I. In This And Other Cases, The Mississippi Supreme Court Has Failed To Follow This Court's Decision In *BMW*.

The Mississippi Supreme Court's decision in this case fails to follow this Court's decision in *BMW v. Gore*. Unfortunately, this case is not unique. Instead, it epitomizes a pattern of recent decisions in which the Mississippi Supreme Court, and courts of some other States, systematically ignore a defendant's constitutional right to adequate notice of exposure to punitive damages. In some cases, the Mississippi Supreme Court has simply ignored *BMW* altogether. In this case, the court recited the *BMW* guideposts, but then articulated a rationale for its decision that directly contradicts *BMW*'s recognition that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 573-74. Review by this

Court is needed to ensure that *BMW* is not flouted by courts which refuse to abide by its teachings.

1. The Mississippi Supreme Court applied the three *BMW* guideposts in a way that vitiates their purpose.

a. *Reprehensibility of Defendant's Conduct.* Under the first *BMW* guidepost, the "flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages." *BMW*, 517 U.S. at 575 n.23. Thus, violent harms are generally considered more reprehensible than nonviolent harms. *See id.* at 576-80. Moreover, "repeated misconduct is more reprehensible than an individual instance of malfeasance." *Id.* at 576; *see also TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 450-53, 462 & n.28 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991).

As in *BMW*, "none of the aggravating factors associated with particularly reprehensible conduct [was] present" in this case. 517 U.S. at 576. First, "[t]he harm . . . inflicted on [Respondents] was purely economic in nature." *Id.* Damages awarded to Respondents represented "actual damages as a result of their discharges in violation of their contracts with [the hospital]." (App., *infra*, 3a.) Additionally, "[Petitioner's] conduct evinced no indifference to or reckless disregard for the health and safety of others." 517 U.S. at 576. Moreover, there was no evidence of repeated misconduct. The Mississippi Supreme Court acknowledged the absence of any "evidence that Paracelsus consistently engaged in the practice of firing its employees for reporting alleged illegal acts," and recognized that "from all accounts, this was a one-time occurrence." (App., *infra*, 13a.)

The Mississippi Supreme Court's conclusion that Petitioner's conduct was reprehensible because Respondents were "fired ... for reporting Revel's actions," (App., *infra*, 13a), does not come close to establishing the reprehensibility

required by *BMW*. When Respondents were discharged, Mississippi law permitted an employer to discharge an employee "for good reason, bad reason, or for no reason at all." *Shaw v. Burchfield*, 481 So. 2d 247, 254 (Miss. 1985). Petitioner had no notice that it would be subjected to punitive damages – let alone a massive award of punitive damages – for discharging Respondents.[3]

b. *The Ratio of Punitive and Compensatory Damages.* The Mississippi Supreme Court's discussion of the second *BMW* guidepost was confined to two points. First, the court stated that ratios of 150:1 and 43:1, although admittedly "high," are "less than that found to be excessive in *BMW*." (App., *infra*, 14a.) Second, the Mississippi Supreme Court acknowledged that the aggravating factors the Court identified in *BMW* are absent in this case: "[T]here were no non-economic damages that were difficult to determine, and there was no injury that was hard to detect." (App., *infra*, 14a.) The Mississippi Supreme Court's opinion simply disregards the second *BMW* guidepost. This Court's decision in *BMW* does not hold that any ratio of less than 500:1 is presumptively constitutional. To the contrary, the Court characterized a 500:1 ratio as "breathtaking." 517 U.S. at 583.

c. *Civil Penalties.* In *BMW*, the Court held that the existence of other punishment for the conduct at issue was an important ingredient of the notice of punitive damages liability required by the Due Process Clause. In this case, the

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[3] The Mississippi Supreme Court's conclusory assertion that Petitioner "concealed or destroyed documentation which would show fraud by Revel" (App., *infra*, 13a) also does not come close to establishing the reprehensibility required by *BMW*. The court's assertion rested on a shaky inference, based solely on the fact that some back-up documents, housed at a storage facility that had been burglarized, could not be located. (*Id.* at 14a.)

Mississippi Supreme Court frankly acknowledged that "[a]s to the last factor ... we conclude that there are no other sanctions which would be imposed under the facts of this case," but it did not let that fact affect its conclusion. (App., *infra*, 14a.) Patently, the Mississippi Supreme Court did not apply this aspect of *BMW*.

The Mississippi Supreme Court's blatant refusal to follow the third *BMW* guidepost is underscored by the fact that the court did not recognize a retaliation exception to the employment-at-will doctrine until 1993, three years *after* Respondents were discharged. *See McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993). Moreover, the court did not hold that punitive damages could be awarded on a claim of retaliatory discharge until it decided *Paracelsus I* in 1996. (App., *infra*, 30a.) It is one thing to apply *McArn* to Petitioner's pre-*McArn* actions for purposes of compensatory damages; it is quite another to impose a massive punitive damages award for conduct that was not subject to any civil or criminal penalties at the time it occurred. Such an award "transcend[s] the constitutional limit." *BMW*, 517 U.S. at 586.[4]

Similarly, although a "tortious breach of contract" may support an award of punitive damages under Mississippi law, it was not until *1992* – two years after Respondents were discharged – that the Mississippi Supreme Court held that an employee handbook setting forth policies to be followed in discharging employees creates an exception to the employment-at-will rule. *See Bobbitt v. Orchard, Ltd.*, 603 So. 2d 356, 361 (Miss. 1992). Prior to that decision,

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[4] A basic premise of punitive damage awards is that penalizing defendants ex post will cause them to take appropriate precautions ex ante. *See, e.g.*, William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 160-65 (1987).

Mississippi adhered to the rule that "the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract." *Id.* at 361-62 (quoting *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981)).

Moreover, the Mississippi Supreme Court repeatedly had recognized that punitive damages ordinarily were not available in breach of contract cases. *See Hurst v. Southwest Miss. Legal Servs. Corp.*, 708 So. 2d 1347, 1350 (Miss. 1998).[5] Under Mississippi law, a punitive damages award may be predicated on a breach of contract only where the breach is accompanied by an intentional wrong or gross negligence such as to constitute an independent tort. The first time the Mississippi Supreme Court applied this highly restrictive standard to permit punitive damages based on breach of an employee handbook was in *Paracelsus I*, years after the conduct at issue. Indeed, in the initial trials, two different state judges held that a breach of the policies set forth in the handbook could *not* support an award of punitive damages. (App., *infra*, 25a.)[6] In short, Petitioner lacked constitutionally adequate notice that its actions violated any state law, or could result in substantial punitive damages.

2. If this case represented an isolated instance of a lower court disregarding this Court's decision in *BMW*, it might not warrant the Court's attention. Unfortunately, however, this case is not an isolated instance. Instead, it fits into a pattern

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[5] *See also Peoples Bank and Trust Co. v. Cermack*, 658 So. 2d 1352, 1361 (Miss. 1995); *Eselin-Bullock & Assocs. Ins. Agency, Inc. v. National Gen. Ins. Co.*, 604 So. 2d 236, 240 (Miss. 1992); *Strickland v. Rossini*, 589 So. 2d 1268, 1273 (Miss. 1991); *Fought v. Morris*, 543 So. 2d 167, 173 (Miss. 1989).

[6] As discussed above, the independent tort in this case – retaliatory discharge – was recognized by the court only *after* the events at issue.

of decisions by the Mississippi Supreme Court that repeatedly fail to heed *BMW*.[7]

In some cases, the Mississippi Supreme Court fails to cite *BMW* or engage in any constitutional analysis whatsoever. *See, e.g., Holland v. Mayfield*, 1999 WL 353023 at *12 (Miss. June 3, 1999) (noting trial court's conclusion that punitive damages were "not excessive" and holding in conclusory fashion that court did not abuse its discretion); *Precision Interlock Log Homes, Inc. v. O'Neal*, 689 So. 2d 778, 780 (Miss. 1997) (reviewing punitive damages award under a deferential "shock the conscience" standard and holding that record contained "findings ... sufficient to warrant the imposition of punitive damages").

In *State Farm Mutual Automobile Insurance Co. v. Grimes*, 722 So. 2d 637 (Miss. 1998), the court sustained a punitive damages award of $1.25 million in a case in which actual damages for breach of contract amounted to only $1,900, and again failed to cite or discuss *BMW*. The court's silence in that case was particularly remarkable, because two dissenting opinions *did* cite *BMW* and took the court to task for failing to follow that decision. Chief Justice Prather noted that "punitive damages in the present case [yielded] ...

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[7] When lower courts have applied the *BMW* guideposts conscientiously, their decisions have balanced the competing interests of deterrence and punishment, on the one hand, and due process on the other. *See, e.g., Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997); *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 504-08 (S.D. 1997); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 468 (Idaho 1996); Cass R. Sunstein et. al, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2093 n.105 (1998) (citing federal and state appellate decisions in support of conclusion that a "constitutional doctrine establishing ... controls on punitive damage awards is now emerging").

a ratio of 658 to 1. For this reason, State Farm's request for a remittitur has merit, and should have been considered by this Court." *See id.* at 647 (Prather, C.J., dissenting). Justice Waller characterized the award as "grossly excessive" in light of the lack of reprehensibility of the conduct. *See id.* at 647-48 (Waller, J., concurring in part and dissenting in part).

Judicial nullification of *BMW* by state courts has not been confined to Mississippi. *See* Douglas G. Harkin, BMW of North America, Inc. v. Gore: *A Trial Judge's Guide to Jury Instructions and Judicial Review of Punitive Damage Awards*, 60 Mont. L. Rev. 367, 389 (1999) ("The most significant impact [of *BMW*] is the divergence between state and federal courts' applications of the *BMW* guideposts. Federal courts are more likely than state courts to reduce a punitive damage award."); Thomas R. Newman & Steven J. Ahmuty, Jr., *How "BMW" Plays in the State Courts*, N.Y.L.J., May 20, 1997, at 3 ("[M]ost state supreme courts have concentrated on *BMW*'s rejection of a mechanical ratio between punitive and compensatory damages and have only paid lip service to the three 'guideposts' established in *BMW*.") The Supreme Court of Alabama, like the Supreme Court of Mississippi, has been especially unwilling to heed *BMW*. *See* Note, Sabrina C. Turner, *The Shadow of* BMW of North America, Inc. v. Gore, 1998 Wisc. L. Rev. 427, 458 ("In cases not specifically remanded by the Supreme Court, the Alabama Supreme Court has virtually ignored [*BMW*].").[8]

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[8] In *Loyal American Life Insurance v. Mattiace*, 679 So. 2d 229 (Ala. 1996), the Alabama Supreme Court, without citing *BMW*, affirmed a $75,000 punitive damages award based on an emotional distress award of $25,000. A dissenting justice concluded that the punitive damages award violated due process because the defendant had no notice that its actions – denial of a beneficiary's claim based on failure to disclose a drunk driving arrest on the application – would subject it to liability, as the issue of plaintiff's (...continued)

3. The jury's award of punitive damages in this case was not only unconstitutionally excessive, but also was measured against standards that "provided no significant constraints or protection against arbitrary results." *BMW*, 517 U.S. at 588 (Breyer, J., concurring). The jury in this case was instructed that it could award punitive damages if it found by "a preponderance of the evidence" that Petitioner discharged Respondents "intentionally, maliciously or with gross negligence or reckless disregard." (App., *infra*, 16a.) Such unconstrained discretion produces "erratic, unpredictable, and arbitrary awards, possibly even meaningless awards," Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2074 (1998); *see also Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring) ("This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."); *TXO*, 509 U.S. at 475 ("[I]t cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict.") (O'Connor, J., dissenting).

As in *BMW*, the Mississippi courts have "neither referred to, nor made any effort to find, nor enunciated" standards that "might have supplied the constraining legal force that the statute and [common law] standards (as interpreted here) lack." 517 U.S. at 592 (Breyer, J., concurring). The constitutional objections to Mississippi's essentially

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entitlement to benefits was debatable and the denial was made in good faith. *See id.* at 243 (Maddox, J., dissenting). Similarly, the court in *Sheffield v. Andrews*, 679 So. 2d 1052 (Ala.), *cert. denied*, 519 U.S. 1041 (1996), affirmed a punitive to compensatory damages ratio of 100,000 to 1 without reference to the *BMW* guideposts.

standardless approach to guiding jury awards of punitive damages are not only substantive (*i.e.*, that excessive awards violate a fundamental interest in freedom from arbitrary deprivations of property), but also procedural. Problems associated with unpredictability, translation of a jury's punitive intent into a monetary award, and the focus on irrelevant factors all are susceptible to substantial amelioration through principled application of legal standards. *See* Sunstein, et al., *supra*, at 2113. Where courts fail to establish and apply such standards, the resulting verdicts are not entitled to a presumption of validity. *See BMW*, 517 U.S. at 586-87 ("[I]f 'fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity.'") (quoting *TXO*, 509 U.S. at 457).

II. There Is A Split of Authority Concerning The Standard of Review That Applies In Evaluating A Punitive Damages Award Under *BMW*.

There is a split of authority, involving both federal courts of appeals and state supreme courts, concerning the correct standard of judicial review to be employed in assessing claims of unconstitutionally excessive punitive damages awards. The conflict increases the disparity among – and thus the arbitrariness of – punitive damages awards by failing to constrain awards in jurisdictions that apply a lenient standard of judicial review. A defendant's constitutional rights to adequate notice and to congruence between the amount of a punitive damages award and the conduct for which the award is imposed should not depend upon the jurisdiction in which suit is brought.

Six federal courts of appeals, along with at least four state supreme courts, have addressed the appropriate standard of review under *BMW*, answering the question in three different ways. The Third and Eighth Circuits and the Oregon Supreme Court have concluded that a challenge to the

constitutionality of punitive damages awards presents a legal question subject to *de novo* review. The Second, Seventh and Ninth Circuits, as well as several state supreme courts, disagree, and apply a deferential abuse of discretion standard. The Eleventh Circuit has taken a third approach, reviewing the "ultimate question" of excessiveness *de novo*, but according substantial deference to findings of fact underlying evaluation of the *BMW* guideposts.

1. In evaluating punitive damages awards, the Third and Eighth Circuits employ a *de novo* standard of review. *See Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 469-70 (3d Cir. 1999), *cert. denied sub nom. Orthofix S.r.l. v. EBI Med. Sys., Inc.*, 120 S. Ct. 791 (2000); *United States v. Big D Enters.*, 184 F.3d 924, 933 (8th Cir. 1999), *cert. denied sub nom. Big D. Enters. v. Dooley*, 120 S. Ct. 1419 (2000). The Third Circuit, in a careful discussion of the issue, recognized that the appropriate standard of review depends on the nature of the inquiry. While admissibility of evidence is governed by an abuse of discretion standard, *see* 181 F.3d at 464, the "gatekeeper" function envisioned by *BMW* requires a more searching standard of review, *see id.* at 467-70. In responding to a vigorous dissent by Judge Garth, the majority observed that the cases upon which the dissent relied in objecting to *de novo* review were all either superseded by decisions of this Court or involved compensatory damages. *See id.* at 469-70 (noting that *Haslip* "counsel[ed] intensive review" of punitive damages awards alleged to be constitutionally excessive).[9] The Oregon

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[9] The Third Circuit's opinion in *Inter Medical Supplies* cites *Johansen v. Combustion Eng'g*, 170 F.3d 1320, 1333-34 (11th Cir.), *cert. denied sub nom Combustion Eng'g Inc. v. McGill*, 120 S. Ct. 329 (1999), for the proposition that punitive damages awards are subject to "plenary review." *See* 181 F.3d at 464. However, the Eleventh Circuit appears to have viewed the due (...continued)

Supreme Court similarly read *BMW* to require *de novo* review of punitive damages awards. *See MacCrone v. Edwards Ctr., Inc.*, 980 P.2d 1156, 1165 (Ore. 1999) ("[W]e will make an independent assessment of the jury's award to determine whether it is constitutionally excessive in violation of due process under the *BMW* guideposts without regard to the trial court's reasoning.").

2. Other courts have reviewed punitive damages awards for abuse of discretion. The Second Circuit, in *Lee v. Edwards*, stated that "[w]e review for abuse of discretion a district court's ruling that a punitive damage award does not 'shock the judicial conscience.'" 101 F.3d 805, 808 (2d Cir. 1996) (citation omitted). The court's discussion indicated that it derived this standard from *BMW*'s establishment of guideposts to apply in identifying "punitive damage award[s] that 'shock[] our judicial conscience.'" *Id.* at 809 (citation omitted). The Seventh Circuit has also adopted an abuse of discretion standard, stating that "we will set aside an award only where it clearly exceeds an amount necessary to [deter and punish]." *Garner v. Wade*, 2000 WL 287649, at *3 (7th Cir. March 16, 2000) (unpublished opinion) (citing *Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729, 736 (7th Cir. 1998) (applying abuse of discretion standard in reviewing punitive damages award)).

The Ninth Circuit, relying on this Court's pre-*BMW* decision in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), recently held that a trial court's determination that a punitive damages award is not constitutionally excessive should be reviewed for abuse of discretion. *See Pavon v. Swift Transp. Co.*, 192 F.3d 902,

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process inquiry as one of mixed fact and law and employed both abuse of discretion and *de novo* standards of review.

909 (9th Cir. 1999).[10] In *Browning-Ferris*, the Court stated: "In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law .... The court of appeals should then review the district court's determination under an abuse-of-discretion standard." 492 U.S. at 279. The Ninth Circuit's conclusion that a standard designed to assess an award under state common law should also apply to evaluation under the Due Process Clause misreads *BMW*. That decision did not create federal common law to supplement state common law, but instead recognized constitutional rights guaranteed by the Due Process Clause.[11]

State supreme courts have also continued to apply deferential standards of review, despite this Court's decision in *BMW*. *See, e.g.*, *Condon Auto Sales & Serv. Inc. v. Crick*, 604 N.W.2d 587, 595 (Iowa 1999) (reading "grossly excessive" language in *BMW* to create deferential standard); *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 415 (Ky. 1998) (holding that *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), requires that claims of constitutionally excessive punitive damages awards should be reviewed for clear error).

3. The Mississippi Supreme Court plainly employed a deferential standard of review in upholding the constitutionality of the punitive damages award in this case.

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[10] A prior Ninth Circuit decision cites *BMW* and states: "We review de novo a claim of a violation of the Due Process Clause." *See Hilao v. Estate of Marcos*, 103 F.3d 767, 780 (9th Cir. 1996).

[11] Of course, a trial court "by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). This is not a case, however, where "[l]ittle turns" on the labels *de novo* and abuse of discretion, *id.*, but rather one where courts are engaging in materially different levels of inquiry, leading to disparate results.

(App., *infra*, at 11a) ("In considering the assertion of an excessive punitive damage award, this Court is not authorized to disturb a jury verdict regarding punitive damages because it seems too low or too high.... It will only be altered or amended when it is so excessive that it evinces passion, bias, and prejudice on the part of the jury so as to shock the conscience."). In its discussion of *BMW*, the court did not indicate that it was applying a more rigorous standard of review, but instead simply noted that "[t]he trial court denied [Petitioner's motion for a new trial], finding that the verdict was supported by the weight of the evidence and was not excessive or influenced by passion or bias." (*Id.*)

The failure of some federal and state appellate courts to conduct *de novo* review under *BMW* perpetuates the problems of arbitrariness associated with pre-*BMW* punitive damages awards. While some courts have taken seriously *BMW*'s admonition to ensure consistent and fair punitive damages awards, others have continued to give juries free reign. This Court should grant the petition to resolve this conflict among federal courts of appeals and state supreme courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2000

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APPENDIX A

PARACELSUS HEALTH CARE CORPORATION
v.
Carolyn WILLARD and Bettie Sue Sumner.

Bettie Sue Sumner
v.
Paracelsus Health Care Corporation, Paracelsus Senatobia Community Hospital,
Inc., and Carolyn Revel.

Bettie Sue Sumner
v.
Paracelsus Health Care Corporation, Paracelsus Senatobia Community Hospital,
Inc., and Carolyn Revel.

Carolyn Willard
v.
Paracelsus Health Care Corporation, Paracelsus Senatobia Community Hospital,
Inc., Carolyn Revel and Danny Swindle.

Nos. 97-CA-01494-SCT, 93-CA-00021-SCT, 92-CA-01274-SCT and 92-CA-00996-SCT.

Supreme Court of Mississippi.

Nov. 4, 1999

ATTORNEYS FOR APPELLANT: GEORGE P. HEWES, III, CYNTHIA L. ELDRIDGE, META V. SWAIN, GERALD W. CHATHAM, SR.

ATTORNEYS FOR APPELLEES: NANCY ALLEN WEGENER, MICHAEL T. LEWIS

BEFORE PRATHER, C.J., BANKS AND SMITH, JJ.

BANKS, Justice, for the Court:

1. In this appeal, this Court is faced with challenges to a punitive damages award based on retaliatory discharge and tortious breach of contract. We conclude that the award was justified and was not excessive under either traditionally common law standards or the federal constitutional statutes announced in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). Accordingly, we affirm.

I.

2. Carolyn Willard and Bettie Sue Sumner, two former hospital employees of Senatobia Community Hospital ("SCH"), brought separate wrongful discharge claims against Paracelsus Healthcare Corporation ("Paracelsus"), SCH and its hospital officials. The juries in both cases found that Willard and Sumner had been terminated in violation of their oral contracts, awarding actual damages in the amount of $10,000 to Willard and $35,102 to Sumner. Willard and Sumner, consolidating their cases, subsequently appealed to this Court, citing error of the trial court in refusing jury instructions on retaliatory discharge and punitive damages based on retaliatory discharge and tortious breach of contract. *Willard v. Paracelsus Health Care Corp.*, 681 So.2d 539 (Miss.1996) (*Willard I*).

3. This Court reversed and remanded the case to the Tate County Circuit Court for a new trial to allow the jury to consider the submission of a punitive damages instruction based on retaliatory discharge as well tortious breach of contract. *Id.* at 543-44. Defendants Carolyn Revel and Senatobia Community Hospital were dismissed based on their financial inabilities to respond to a possible punitive damages award.

4. The facts as set out in the previous opinion of this Court in *Willard I*, 681 So.2d at 540-42, delivered on September 12, 1996, accurately describe the events

surrounding the terminations of Willard and Sumner, as presented to the jury in the punitive damages trial.

5. A punitive damages instruction was submitted to the jury on remand, along with jury instructions on retaliatory discharge and tortious breach of an oral contract. Submitted with these instructions were Special Interrogatories. Based on the evidence presented, the jury's response to the Special Interrogatories resulted in a punitive damages award of $1,500,000 each to Willard and Sumner. Aggrieved, Paracelsus appeals to this Court for relief.

II.

6. Paracelsus argues that the trial court committed manifest error by limiting the second trial to only the issue of punitive damages. Also discussed in this subsection are sub-issues raised by Paracelsus that the trial court erred by failing to require the jury to award actual damages for retaliatory discharge before allowing the jury to consider punitive damages and that allowing a trial only on the issue of punitive damages violates the guarantee of Miss. Code Ann. § 11-1-65(1)(b) (Supp.1999) that the same jury decide both punitive and actual damages.

a.

7. Paracelsus asserts that in *Willard I*, the Court reversed the trial court's decision as to damages, making it necessary for a retrial on all damage awards. It contends that on remand, the trial court misapplied the holding of *Willard I* by failing to retry the compensatory damages award resulting from its breach of contract with Willard and Sumner.

8. Paracelsus is incorrect in its assertion that this Court reversed the compensatory damage awards in *Willard I*. Through jury verdicts, Willard and Sumner were awarded $10,000 and $35,102, respectively, in actual damages as a result of their discharges in violation of their contracts with SCH. *Willard I* at 541. Willard's award was based on

constructive discharge and breach of oral contract, while Sumner's award was based on breach of oral contract. On direct appeal to this Court in consolidated cases, the issues presented as error included: failure of the trial court to give a retaliatory discharge instruction; whether punitive damages instructions based on retaliatory discharge and tortious breach of contract should have been given; and the denial of attorney's fees. *Id.* Finding error in the trial court's refusal to give the retaliatory discharge instruction and the punitive damages instructions, the Court reversed and remanded the matter to the trial court for a new trial on these issues.

9. Generally, under law of the case doctrine, the trial court on remand is bound by this Court's ruling on appeal. *Fortune v. Lee County Bd. of Supervisors*, 725 So.2d 747, 751 (Miss. 1998). However, the awards were not considered by the Court in its previous opinion in *Willard I* because no error was alleged by Willard or Sumner in the awarding of actual damages. Paracelsus's argument on this point fails.

b.

10. Paracelsus also asserts that under Miss. Code Ann. § 11-1- 65(1)(b) (Supp.1999), the same jury assessing actual damages must be the jury that considers punitive damages. Paracelsus argues that the jury was not afforded any opportunity to award actual damages based on retaliatory discharge, but was instructed to immediately consider punitive damages if it found that Willard and Sumner had been subjected to retaliatory discharge.

11. Section 11-1-65(1)(b) states that:

> In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.

12. Paracelsus asserts that,

> [i]f, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered.

Miss. Code Ann. § 11-1-65(1)(c) (Supp.1999).

13. As to the retaliatory discharge claim, the jury was not given an opportunity to award compensatory damages. The special interrogatories to the jury read as follows:

> 1. Was the plaintiff Carolyn Willard constructively discharged in retaliation for reporting forged checks?
>
> 2. When Paracelsus constructively discharged the Plaintiff Willard in breach of the employment contract as supplemented by the handbook, was the discharge the result of intentional wrong, malice, insult, abuse, reckless disregard, or gross negligence?
>
> 3. If you answer either of the above questions with a "yes" then you may award punitive damages in accordance with the court's other instructions. If you decide to award punitive damages enter the amount of the punitive damages award in the following blank.

14. The jury answered questions one and two affirmatively, awarding Willard $1,500,000. The second interrogatory submitted read identical to the one above, except question one read:

> Was the plaintiff Bettie Sue Sumner fired in retaliation for reporting the alleged forged checks?

The jury again answered the questions in the affirmative, awarding Sumner the same amount as Willard. In Jury Instruction 7(P-8), the jury was instructed as follows:

> In considering the issued of punitive damages, you shall accept the following facts as proven. Defendant Carolyn Revel, at all times pertinent, was an employee of Paracelsus Healthcare Corporation and the administrator of the Senatobia Community Hospital.
>
> The Plaintiffs Carolyn Willard and Bettie Sue Sumner had an oral contract of employment supplemented by the Handbook with the Senatobia Community Hospital.
>
> The Plaintiffs Carolyn Willard and Bettie Sue Sumner were discharged in violation of the oral contract supplemented by the Handbook.
>
> The Plaintiffs have already been compensated for their actual damages in the amounts of $10,000 for Carolyn Willard and $35,102 for Bettie Sue Sumner.

15. The trial court essentially instructed the jury that compensatory damages had already been awarded in the prior trials. Upon review of the record, Paracelsus did not object to Instruction 7(P-8), but requested that the last paragraph stating that compensatory damages had already been awarded remain in the instruction. Its position in the trial court was that Willard and Sumner had been compensated for their losses and could not be compensated twice for the same injury. Paracelsus now argues on appeal to this Court that the trial court failed to allow the jury to consider compensatory damages for the tortious breach of contract and retaliatory discharge claims.

16. This Court can only review matters on appeal as were considered by the lower court. *Ditto v. Hinds County*, 665 So.2d 878, 879 (Miss.1995). The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal. *Ballenger v. State*, 667 So.2d 1242, 1264 (Miss. 1995). Moreover, as

shall be shown below, this is a contract action to which § 11-1-65 does not apply. Miss. Code Ann. § 11-1-65(2)(a) (Supp.1999).

17. Finally, the compensatory damages awarded in the prior trials were for the constructive discharge and breach of contract claims. That the motive for discharge was retaliation adds nothing to the compensatory damages, which arose out of the discharge itself. Actual damages based on retaliatory discharge and tortious breach of contract are the same as those awarded in the prior trials for breach of oral contract, such as lost wages. Thus, compensatory damages for these claims could have carried over into the second trial, making it unnecessary for the jury to reconsider actual damages as to these claims. Therefore, this argument fails.

c.

18. Paracelsus alleges it was error for the trial court to consider punitive damages based on either retaliatory discharge or tortious breach of contract because the facts developed in the second trial do not meet the threshold for punitive damages.

19. Paracelsus argues that Willard and Sumner have failed to show that its conduct was egregious enough to warrant an award of punitive damages and that the facts surrounding the discharge of Willard and Sumner do not support an award of punitive damages in this case. It further argues that this Court in *Willard I* did not mandate that a punitive damages instruction be given, but rather, that a retaliatory discharge instruction be submitted to the jury, with a suggestion that the trial court may consider a punitive damages instruction on both grounds.

20. In order for punitive damages to be awarded, the plaintiff must demonstrate a willful or malicious wrong or the gross, reckless disregard for the rights of others. *Valley Forge Ins. Co. v. Strickland*, 620 So.2d 535, 540 (Miss. 1993). Punitive damages are only appropriate in the most

egregious cases so as to discourage similar conduct and should only be awarded in cases where the actions are extreme. *Wirtz v. Switzer*, 586 So.2d 775, 783 (Miss. 1991). The jury should be allowed to consider the issue of punitive damages if the trial judge determined under the totality of the circumstances and in light of defendant's aggregate conduct, that a reasonable, hypothetical juror could have identified either malice or gross disregard to the rights of others. *Id.*

21. The basis of the action in this case is breach of the employment contract. Retaliatory discharge, found by this Court to be an independent tort in *Willard I*, is but another form of tortious breach of contract. Describing retaliatory discharge as an independent tort does not mean that the underlying cause of action is not one for breach of contract. Turning to sister jurisdictions for guidance, several courts have found that an action for retaliatory discharge is a contract action. *See Phillips v. Butterball Farms Co.*, 448 Mich. 239, 531 N.W.2d 144 (Mich. 1995); *Mourad v. Automobile Club Ins. Ass'n*, 186 Mich. App. 715, 465 N.W.2d 395 (Mich. Ct. App. 1991). *Accord Moffett v. Gene B. Glick Co.*, 604 F.Supp. 229, 238 (N.D.Ind.1984) (action for retaliatory discharge found to be breach of contract claim), *overruled on other grounds*, *Reeder-Baker v. Lincoln Nat'l Corp.*, 644 F.Supp. 983, (N.D. Ind. 1986). This Court has held that in order to obtain punitive damages in breach of contract cases, the plaintiff must show that the breach resulted from an intentional wrong and that the defendant acted with malice or gross/reckless disregard for the rights of others. *American Funeral Assur. Co. v. Hubbs*, 700 So.2d 283, 285 (Miss. 1997).

22. With regard to the retaliatory discharge, Paracelsus asserts that the record is devoid of evidence which would show malice or gross/reckless disregard in the discharge of either Willard or Sumner. It specifically argues that both appellees were terminated for valid reasons and that the jury

should have been instructed that to find it liable on this claim, it had to find that a crime had been committed.

23. This Court has determined that there is an action based on a public policy exception to the employment at will doctrine when 1) an employee refuses to participate in an illegal act; or 2) an employee is discharged for reporting illegal acts of his employer to the employer or anyone else. *McArn v. Allied Bruce-Terminix Co.*, 626 So.2d 603, 607 (Miss. 1993). Contrary to Paracelsus's argument, neither *McArn* or *Willard I* (finding punitive damages available for retaliatory discharge), suggest that the plaintiff must first prove that a crime was committed. Thus, this contention fails.

24. In *Willard I*, this Court concluded that:

> The public has a legitimate interest in seeing that people are not discharged for reporting illegal acts or not participating in illegal acts which may result in harm to the public interest. Anyone who terminates an employee for such reasons should be allowed a jury instruction on the issue of punitive damages in order to deter similar future conduct. Discharge in retaliation for an employee's good faith effort to protect the employer from wrongdoing constitutes an independent tort and may support punitive damages.
>
> However, a violation of the public policy exception to the employment at-will doctrine does not per se create a jury issue on the award of punitive damages. It will remain within the purview of the trial court to determine whether this issue should be submitted to the jury. The trial court must decide if "under the totality of the circumstances and viewing the defendant's conduct in the aggregate, a reasonable hypothetical trier of fact could have found either malice or gross neglect/reckless disregard." *Wirtz v. Switzer*, 586 So.2d 775, 783 (Miss. 1991). On

> remand, the trial court may consider the submission of a punitive damages instruction based on the independent tort of retaliatory discharge.

681 So.2d at 543.

25. While Paracelsus is correct in its assertion that this Court did not mandate that a punitive damages instruction on retaliatory discharge be given, the trial court did not err in allowing this instruction to be submitted. The record evidence clearly shows that a reasonable trier of fact could have found malice or gross disregard for the rights of Willard and Sumner. They both had impeccable work records and had received positive evaluations from Revel herself prior to the reporting of the incident involving the forged checks by Revel, which led to their firing. The jury was free to infer that Willard and Sumner were terminated for their actions of reporting Revel's wrongdoing. Therefore, this argument is without merit.

26. Paracelsus further asserts that the trial court erred in giving a punitive damage instruction based on tortious breach of contract. Paracelsus argues that its failure to follow the handbook in the termination of Willard and Sumner does not rise to the level of an independent tort.

27. As discussed *supra*, punitive damages are recoverable in breach of contract cases where the breach results from an intentional wrong and when there has been a showing of malice or gross/reckless disregard for the rights of others. *American Funeral Assur. Co. v. Hubb*, 700 So.2d at 285. Paracelsus relies on *Southwest Miss. Reg'l Med. Ctr. v. Lawrence*, 684 So.2d 1257 (Miss. 1996) for the proposition that failure to comply with an employee handbook is insufficient to support an award of punitive damages. However, the facts of the cases are distinguishable. *Southwest* dealt with a coverage issue regarding an employee benefit. On the facts of the case, the Court held that a punitive damages award was not supported. *Id.*

28. Here, in *Willard I*, this Court concluded that it was possible for the jury to have found that the breach of contract was an intentional wrong, and that a reasonable jury could have found that such an intentional wrong necessitated the imposition of punitive damages. *Willard I*, 681 So.2d at 544. In light of this fact and considering the record in this case, the trial court did not err in submitting a punitive damages instruction based on tortious breach of contract. This contention is without merit as well.

III.

a.

29. Paracelsus asserts the punitive damages verdicts are excessive and against the overwhelming weight of the evidence. Paracelsus also claims the shocking size of the judgments clearly evidences passion and bias on the part of the jury.

30. In considering the assertion of an excessive punitive damage award, this Court is not authorized to disturb a jury verdict regarding punitive damages because it seems too low or too high. *C & C Trucking Co. v. Smith*, 612 So.2d 1092, 1106-07 (Miss. 1992). It will only be altered or amended when it is so excessive that it evinces passion, bias, and prejudice on the part of the jury so as to shock the conscience. *Id.* This Court has held that no hard and fast rule exits for establishing the maximum amount of punitive damages which can be awarded in any given case. *Dixie Ins. Co. v. Mooneyhan*, 684 So.2d 574, 585 (Miss. 1996).

31. In its motion for new trial, Paracelsus raised the argument that the amount of the verdict was unconstitutional based on *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). The trial court denied its motion, finding that the verdict was supported by the weight of the evidence and was not excessive or influenced by passion or bias.

32. The Supreme Court found the punitive damages award in *BMW* to be excessive when considered in light of the reprehensibility of the defendant's conduct. *Id.* at 575-76. *BMW* also set forth guidelines which state courts should use when faced with challenges that the award is excessive and exceeds the constitutional limits, which include: 1) the degree of reprehensibility of the defendant's conduct; 2) the ratio between the plaintiff's compensatory damages and the amount of punitive damages; 3) the difference between the punitive damages and civil or criminal sanctions that could be imposed for comparable misconduct. *Id.*

33. The common law factors are essentially those set out in *Dixie Ins. Co. v. Mooneyhan*, 684 So.2d 574, 585 (Miss. 1996) (amount of punitive damage award to be considered in light of: 1) whether amount serves to punish wrongdoer and as a deterrence from similar future conduct; 2) amount should serve as an example to deter others from similar offenses; 3) the amount should account for the pecuniary ability and net worth of defendant).

34. Considering this issue in light of the aforementioned factors, the amount awarded seems rationally related to the purpose of deterring Paracelsus or other employers from such conduct in the future. The prevention of terminations such as that of Willard and Sumner is necessary to promote and encourage employees like Willard and Sumner, who take an active interest in the well-being of the companies that employ them. The deterrence of conduct such as that by Paracelsus possesses employees with the ability to report misconduct about their employers or other employees without fear of repercussion. Paracelsus's action of terminating Willard and Sumner, both shown to be exemplary employees, for reporting the misconduct of Revel was in fact reprehensible, especially in light of the fact that Willard and Sumner were terminated despite favorable evaluations from Revel herself.

Although there appears to be no record evidence that Paracelsus previously engaged in conduct like that presented in this case, Paracelsus was aware that Willard and Sumner were subsequently terminated after reporting Revel's actions to corporate officials. Despite the suspicions voiced by Willard and Sumner as to their firings, Paracelsus supported the terminations.

35. Paracelsus is also financially able to pay the punitive damages award. For the quarterly period ending March 31, 1997, Paracelsus had a net revenue of $168,490,000, with a net worth of $53,469,000. For the same period, Paracelsus's total assets equaled over $800,000,000. It is evident to the Court that Paracelsus' financial condition permits payment of the punitive damages amount, $3,000,000 combined, without imposing financial hardship to the company.

36. However, we must also consider the factors set out in *BMW*. Under these factors, the punitive damages awarded are not excessive. We first consider the degree of reprehensibility of Paracelsus's conduct. The *BMW* court noted that some wrongs are more blameworthy than others and that the damages imposed should reflect the enormity of the offense. *BMW* at 575. Sumner and Willard assert that because Paracelsus intentionally breached the employment contract, made false statements concerning the use of the employee handbook, fired appellees for reporting Revel's actions, and concealed or destroyed documentation which would show fraud by Revel, Paracelsus's conduct met the requirements of this factor.

37. There is no evidence that Paracelsus consistently engaged in the practice of firing its employees for reporting alleged illegal acts, and from all accounts, this was a one-time occurrence. The appellees, however, were terminated in violation of their contracts. There was testimony that back-up copies of the vouchers and checks, which appellees argue was proof of the forged checks, could

not be found although there is testimony that it did exist. There was also testimony that much of the back-up documentation had been housed at a storage facility, which was later burglarized. Paracelsus offered this as reason why some documentation related the forged checks was missing. The jury was entitled to infer from the evidence presented whether there was any concealment of documentation by Paracelsus.

38. We next consider the ratio between the compensatory damages and the amount of punitive damages. Here, Willard's award was 150 times actual damages while Sumner was awarded over 43 times the amount of actuals. In *BMW*, the Court reasoned that the constitutional line is not marked by a simple mathematical formula. *BMW*, 517 U.S. at 582. The Court there found that a punitive damages award 500 times the amount of actual damages was clearly outside the acceptable range. *Id.* at 560. The Court, however, asserted that a higher ratio is justified in cases where the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine. In this case, there were no non-economic damages that were difficult to determine, and there was no injury which was hard to detect. The harm inflicted to Willard and Sumner was purely economic in nature, and both women were easily able to obtain other employment. Although high, we note that the ratio here is far less than that found to be excessive in *BMW*.

39. As to the last factor comparing the punitive damage award with possible civil or criminal sanctions, we conclude that there are no other sanctions which would be imposed under the facts of this case.

40. Based on the foregoing analysis, this Court concludes that the award of punitive damages in this case was not constitutionally excessive.

b.

41. Paracelsus further argues that prejudicial comments by appellees' counsel biased the jury. It also alleges that the manner in which appellees' expert witness was paid likely influenced his testimony, increasing the jury's prejudice against Paracelsus.

42. Paracelsus first points to a statement by counsel for appellees during closing argument regarding the sale of SCH. While Paracelsus asserts that the parties agreed in chambers that the jury would not be advised of any attempts to sell SCH, this Court finds no evidence of such in the record. Moreover, the trial court sustained Paracelsus's objection to the statement, instructing the jury to disregard the statement.

43. Paracelsus also contends that counsel for appellees made a statement suggesting that it had sent no representatives to attend the trial. During closing argument, counsel for appellees made reference to his observation that no one was present at the trial from the corporate offices of Paracelsus. Specifically, he stated that "There's not even anybody in this courtroom from that company. This gentleman, Mr. Tesar, is with a corporation that's not even in the lawsuit. We've let them out." Mr. Tesar was the current administrator for SCH. In response to Paracelsus's objection, the appellees' attorney did retract this statement and clarified for the jury that he was trying to say no one was present from the corporate headquarters of the company.

44. Paracelsus goes on to argue that because appellees' expert witness was paid pursuant to a contingency fee, his testimony was influenced. Paracelsus cites Rule 3.4(b) of the Mississippi Rules of Professional Conduct, which prohibits an attorney from "offering an inducement to a witness that is prohibited by law." The comment to Rule 3.4(b) provides that while it is improper to pay an expert witness a contingent fee, it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. *Id.*

45. Bruce Charles, appellees' expert on corporate finance, had never testified as an expert before and had no set rate of compensation for testifying. On cross examination, Charles denied that he was being paid on a contingency fee and that he was informed by appellees that he would be reimbursed for expenses such as travel and long distance charges and that he would be fairly compensated for time away from his business and family. We find nothing in the record to suggest that Charles's fee was contingent as Paracelsus argues.

46. In light of the foregoing, we conclude that Paracelsus's contention of bias and prejudice is without merit.

IV.

47. Paracelsus asserts that Jury Instruction 11 improperly stated the burden of proof necessary in order to recover punitive damages for the tort of retaliatory discharge as proof by a preponderance of the evidence.

48. Paracelsus contends that a plaintiff asserting a tort claim must prove the claim by clear and convincing evidence, while the burden in contract claims is preponderance of the evidence. Paracelsus also argues that the trial court erred in denying proposed Jury Instruction D-11(a), which it claims states the burden of proof necessary for tortious breach of contract.

49. Instruction 11 reads as follows:

> If you find from a preponderance of the evidence that Defendant discharged Plaintiffs Carolyn Willard and Bettie Sue Sumner in retaliation of their refusal to participate in an illegal act or for their reporting an illegal act when they reported the alleged forged checks, then you shall find for the Plaintiffs Carolyn Willard and Bettie Sue Sumner on the issue of retaliatory discharge.

A malicious act is a wrongful act intentionally done without legal justification or excuse. A wanton act is an act done in reckless disregard of the rights of others.

If you further find that the retaliatory discharge was done intentionally, maliciously or with gross negligence or reckless disregard, then you may award punitive damages to Plaintiffs Carolyn Willard and Bettie Sue Sumner.

Proposed Instruction D-11 read:

If you find that Defendant Paracelsus Health Care Corporation tortiously breached its contract with Carolyn Willard and/or Bettie Sue Sumner that the Plaintiffs suffered damage, you may then consider whether to award punitive or exemplary damages against the Defendant for the sake of example and by way of punishment. You may, in your discretion, award such damages if, but only if, you find by clear and convincing evidence that the Defendants were guilty of oppression or malice in the conduct on which you base your findings of liability.

"Malice" means conduct which is intended by the Defendant to cause injury to the Plaintiff, or is carried on by the Defendant with conscious disregard of Plaintiff's rights.

The law provides no fixed standard for the amount of punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages you are to consider the following:

1. The reprehensibility of the Defendant's conduct;

2. The amount of punitive damages which will have a deterrent effect on the Defendants, in light of the Defendants' financial condition; and

3. That any punitive damages awarded must bear a reasonable relation to actual damages.

50. Miss. Code Ann. § 11-1-65(1)(a) (Supp.1999), effective from and after July 1, 1993, states in pertinent part that:

> In any action in which punitive damages are sought ... punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton, or reckless disregard for the safety of others, or committed actual fraud....

51. Section 11-1-65(2)(a) states that the provisions of this section shall not apply to contracts. The issue of punitive damages in suits for tortious breach of contract is instead governed by common law. *American Funeral Assur. Co. v. Hubbs*, 700 So.2d 286. Although punitive damages are not ordinarily recoverable in cases involving breach of contract, they are recoverable where the breach results from an intentional wrong, insult, or abuse as well as from such gross negligence as constitutes an independent tort. *Id.* at 286 (quoting *Blue Cross & Blue Shield of Miss., Inc. v. Maas*, 516 So.2d 495, 496-97 (Miss. 1987)). Before punitive damages can be recovered, the plaintiff must prove by a preponderance of the evidence that the defendant acted with (1) malice or (2) gross negligence or reckless disregard for the rights of others. *Id.*

52. On appeal, this Court does not review jury instructions in isolation; rather they are read as a whole to determine if the jury was properly instructed. *Lovett v.*

Bradford, 676 So.2d 893, 896 (Miss. 1996) (quoting *Peoples Bank & Trust Co. v. Cermack*, 658 So.2d 1352, 1356 (Miss. 1995)). Accordingly, defects in instructions do not require reversal where all instructions taken as a whole fairly-although not perfectly-announce the applicable primary rules of law. *Id.* at 897. However, if those instructions do not fairly or adequately instruct the jury, this Court can and will reverse. *Id.*

53. This Court in *Willard I* recognized that retaliatory discharge is an independent tort. *Willard I* at 543. However, this description does not sever the underlying cause of action as one for breach of contract. It is well-settled that punitive damage awards arising out of breach of contract require proof of an independent tort. *Blue Cross v. Blue Shield of Miss., Inc. v. Maas,* 516 So.2d at 496-97. On this premise, it is suggested that the standard of proof necessary to recover punitive damages based on retaliatory discharge is proof by a preponderance of the evidence, which is the common law standard for contract breaches involving an intentional wrong. *See Hurst v. Southwest Miss. Legal Servs. Corp.*, 708 So.2d 1347, 1350 (Miss. 1998); *American Funeral Assur. Co. v. Hubbs*, 700 So.2d at 285-86.

54. The jury in this case was properly instructed on the burden of proof necessary for punitive damages to be awarded based on retaliatory discharge. Instruction 11 correctly stated that the jury must find by a preponderance of the evidence for Willard and Sumner on the issue of retaliatory discharge in order for punitive damages to be awarded.

55. We conclude that the trial court did not err in refusing to give Instruction D-11. As worded, it appears to state that the burden which must be met to recover punitive damages for tortious breach of contract is clear and convincing evidence, which is an incorrect statement of law. This assignment is, thus, without merit.

V.

56. Paracelsus contends that the interrogatories, as submitted, led the jury to conclude that it must assess some amount of punitive damages.

57. The Special Interrogatories submitted to the jury read as follows:

> 1. Was the plaintiff Carolyn Willard constructively discharged in retaliation for reporting the forged checks?
>
> ____yes ____no
>
> 2. When Paracelsus constructively discharged the Plaintiff Willard in breach of the employment contract as supplemented by the handbook, was the discharge the result of intentional wrong, malice, insult, abuse, reckless disregard, or gross negligence?
>
> ____yes ____no
>
> 3. If you answer either of the above questions with a "yes" then you may award punitive damages in accordance with the court's other instructions. If you decide to award punitive damages, enter the amount of the punitive damages award in the following blank:
>
> _____
>
> 4. If you decide that punitive damages are not appropriate in this case, then you should write "NONE" in the following blank.
>
> _____

58. The interrogatory read the same as it related to Sumner, except for paragraph one, which required the jury to answer whether Sumner had been fired in retaliation for reporting the alleged forged checks. The jury answered yes to questions one and two on each form, awarding both Willard and Sumner $1,500,000 each in punitive damages.

59. At trial, Paracelsus objected to the special interrogatories on grounds which differ from those now presented on appeal to this Court. While its argument on appeal is that the form of the interrogatories led the jury to believe it must award punitive damages, its basis for objection at the trial court centered on the insertion of the words alleged and malice in appropriate places within the interrogatories. This Court has held that a defendant is procedurally barred from raising an objection on appeal that is different from that raised at trial. *Jones v. State*, 606 So.2d 1051, 1058 (Miss. 1992). This assignment fails.

VI.

60. For the foregoing reasons, the judgment of the trial court is affirmed.

61. AFFIRMED.

PRATHER, C.J., SULLIVAN AND PITTMAN, P.JJ., McRAE AND SMITH, JJ., CONCUR. WALLER, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY COBB, J. MILLS, J., NOT PARTICIPATING.

WALLER, Justice, concurring in part and dissenting in part:

62. I agree with the majority in all respects save the amount of punitive damages awarded, which I find to be arbitrary and unreasonable. Therefore, I respectfully concur in part and dissent in part.

63. In *Bankers Life & Cas. Co. v. Crenshaw*, 483 So.2d 254, 278 (Miss. 1985), *aff'd on other grounds*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988), we set out general factors to be considered in awarding punitive damages, including the amount necessary to punish the defendant for wrongdoing and to deter the defendant from similar conduct in the future; and the amount necessary to deter others from committing similar conduct. We expanded our factors to

include consideration of such amount as is necessary to reward the plaintiff for public service in bringing the wrongdoer to accountability. *See Mutual Life Ins. Co. v. Estate of Wesson*, 517 So.2d 521, 532 (Miss. s1987).

64. Focusing on the reprehensibility of the defendant's conduct, the United States Supreme Court, in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 589 (1996), found an award of punitive damages to be grossly excessive. The Court noted, "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575. I do not believe Paracelsus' conduct to be so egregious as to warrant a punitive damages award of $1.5 million for each plaintiff. Even though Paracelsus wrongfully terminated Willard and Sumner for reporting illegal acts, there is an absence of proof of any aggravating factors associated with that conduct. Paracelsus' conduct evinced no reckless disregard for the health and safety of Willard and Sumner. The harm suffered by them was purely economic in nature; both were easily able to obtain other employment; and both were adequately compensated by the jury for their actual losses. Additionally, there is no evidence of Paracelsus repeatedly engaging in the same conduct. While I do not suggest a categorical approach in determining an acceptable punitive damages award, I am convinced that the amount awarded below is unnecessary to meet the goals of punishment, deterrence, and adequately rewarding the plaintiffs for bringing the action.

65. When an award of punitive damages is excessive, a remittitur is appropriate. Miss. Code Ann. § 11-1-55 (1991). Therefore, I would order a remittitur of $750,000 on the punitive damages award of each plaintiff. Either Willard or Sumner could accept or decline a remittitur without affecting the other's right to a new trial. If Willard and Sumner accept the remittitur reducing the punitive damages award to

$750,000 for each of them, the judgment of this Court would become final within ten days and the trial court's judgment, as reduced by the remittitur, would be affirmed. If both decline the remittitur, the judgment below would be reversed in part to the extent that it awards punitive damages, and this case would be remanded to the lower court for a new trial on punitive damages alone. Of course, one may accept the remittitur, and the judgment would become final as to her, and one may decline the remittitur and be granted a new trial on punitive damages.

66. I, therefore, respectfully concur in part and dissent in part.

COBB, J., JOINS THIS OPINION

APPENDIX B

Carolyn WILLARD
v.

PARACELSUS HEALTH CARE CORPORATION,
Paracelsus Senatobia Community Hospital,
Inc., Carolyn Revel and Danny Swindle.
Bettie Sue SUMNER
v.

PARACELSUS HEALTH CARE CORPORATION,
Paracelsus Senatobia Community Hospital,
Inc., and Carolyn Revel (Two Cases).

Nos. 92-CA-00996-SCT,
92-CA-01274-SCT and
93-CA-00021-SCT.

Supreme Court of Mississippi.

Sept. 12, 1996.

Michael T. Lewis, Lewis & Lewis, Clarksdale, Nancy A. Wegener, Clarksdale, for Appellants.

Gerald W. Chatham, Sr., Hernando, for Appellees.

Before SULLIVAN, P.J., and PITTMAN and BANKS, JJ.

PITTMAN, Justice, for the Court.

Summary of the Case

The Appellants, Carolyn Willard and Bettie Sue Sumner, were employees of Senatobia Community Hospital, a wholly owned subsidiary of Paracelsus Health Care Corporation.[1] Willard and Sumner reported to higher-ups that a certain

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[1] Throughout this opinion, the Appellees are collectively referred to as "Paracelsus."

number of Paracelsus checks were made out to hospital administrator Carolyn Revel as well as signed by Revel and allegedly done so in violation of hospital policy. Willard, and then Sumner, were subsequently discharged. The gist of their case at trial was that they were fired by Revel in retaliation for reporting the checks. Paracelsus cited other reasons. Willard and Sumner had separate trials; however, their cases are consolidated on appeal. Willard and Sumner address the same issues on similar facts.

The juries returned a verdict against Paracelsus and awarded actual damages in the amount of $10,000 to Willard and $35,102 to Sumner. Special interrogatories were submitted to both juries in which they found that Willard's and Sumner's discharges were in violation of their contracts with the hospital as supplemented by the handbook and personal policy and procedure manual. Neither jury found that the hospital intentionally inflicted emotional distress upon Willard nor Sumner.

We are called on to decide whether the trial courts erred by refusing to give the juries an instruction on retaliatory discharge, and further, if such error was committed, whether the juries should have been allowed to consider an award of punitive damages based on retaliatory discharge. Additionally, we must determine whether the lower courts erred by failing to grant a punitive damages instruction based on tortious breach of contract. We hold that the trial court erred on both of these points. However, we affirm the trial court's denial of attorney's fees for Willard and Sumner.

Summary of the Facts

Willard was hired on July 27, 1988, and received a copy of the Senatobia Community Hospital Employee Handbook. She signed a card acknowledging the receipt of this handbook and also acknowledging that she had familiarized herself with it.

Willard was the accounts payable clerk before being promoted to business office manager. She had the responsibility of doing the bank reconciliation. After her promotion and while she was training the new accounts payable clerk, she continued to do the bank reconciliation. Most Paracelsus checks were keyed into the computer and were printed by the computer along with a department code. Manual checks were typed on the typewriter. They were used in emergencies only when an immediate payment was necessary. Copies or backups of manual checks were retained in the accounts payable office for two years.

In August 1990 Willard received a copy of the July bank statement which was faxed from Paracelsus headquarters in California. When Willard tried to match the bank statement with the check ledger, there were three checks on the bank statement which were not in the ledger nor in the computer system. These amounts were $2,500, $3,000 and $2,000. Willard searched all files and records trying to locate the checks. She could not locate any of the backup documents. Three weeks later when the canceled checks arrived, she found the three unaccounted for checks in the above amounts made payable to Carolyn Revel and signed by Revel and Clifford Olson. Clifford Olson was the former chief financial officer for Paracelsus who had left his employment at the hospital. He testified that he did not sign the three checks. Willard, Sumner (an administrative secretary who had authority to sign Paracelsus checks), and Kiefer (the new accounts payable clerk) confronted Olson. Willard also reported the conduct to Pete Mistr, the regional chief financial officer in Nashville. Willard claimed she was subsequently discharged for these actions. Willard's personnel file contained no reprimands and only outstanding evaluations.

Additionally, Sumner reported two checks that arrived later in August and were made out to Revel. She testified

that these two checks contained Revel's signature and her (Sumner's) own forged signature.

The evidence at trial showed that all original documents relevant to the suspicious checks were missing although they were kept in several different locations. The only copies of the five forged checks were those provided by Willard and Sumner. None of the five original checks or the yellow and pink copies of the checks or the accounts payable for that period were produced. However, Kiefer claimed to have seen these records and sent them to storage two weeks before the auditors were to examine them. Not long after, a break-in occurred at the storage facility in which these records were purportedly stolen.

Revel and Paracelsus maintained at trial that Willard was not fired but that she resigned. Revel testified that she was paged at the hospital on August 22, 1990, by Danny Swindle, who replaced Olson. At that time Swindle told Revel that Willard wanted her money and was leaving. According to Revel, Swindle was trying to discuss with Willard some complaints they had received about accounts payable when Willard up and quit.

Revel also testified that she had seen Olson's deposition wherein he stated he did not sign the three checks and noted that as soon as it came to her attention she thought it might be forgery. However, she stated that if she as hospital administrator signed the check, it was not necessary that the check be signed by another person.

On September 17 Sumner was terminated by Revel for, among other things, an incident involving a woman demanding treatment in the hospital's emergency room. Sumner maintained at trial that her termination was a result of her conduct in reporting the checks. Sumner also testified that she thought she had certain rights as stated by the handbook. Particularly, she thought Paracelsus should follow the disciplinary procedures set out in the handbook for

a first offense. Only for a critical offense could you be terminated on a first offense. The only critical offenses were theft or dishonesty. Such a termination required a three-day suspension while an investigation was undertaken. This procedure was not followed for Sumner or Willard nor were the procedures for other types of offenses followed.

Sumner had never received an oral or written reprimand. Her personnel file revealed no negative reviews.

Chronology

1990	
First Week in Aug.	Willard and Sumner report three checks.
Aug. 22	Willard leaves.
Aug. 27	Sumner reports two checks.
Sept. 5	Revel repays Paracelsus for three checks (the two allegedly co-signed by Sumner and the one co-signed by Olson).
Sept. 6	Revel reduces Sumner's job description.
Sept. 14	Emergency room incident.
Sept. 17	Sumner is fired.

Paracelsus maintained from the beginning of the lawsuits that it did not acknowledge the handbook. Revel testified at the Willard trial that she did not recognize the handbook, because it was issued when the hospital was under the control of someone other than her employer, Paracelsus. At the Sumner trial, Revel testified that there was a handbook, but it was undergoing revision.

Discussion of the Law

I. DID THE TRIAL COURT ERR BY REFUSING TO GIVE A RETALIATORY DISCHARGE INSTRUCTION?

We addressed this issue in *McArn v. Allied Bruce-Terminix, Inc.*, 626 So.2d 603, 607 (Miss. 1993), where we ruled that there is an action at law based on a

public policy exception to the employment at-will doctrine in either of the two following circumstances: 1) an employee refuses to participate in an illegal act; or 2) an employee is discharged for reporting illegal acts of his employer to the employer or anyone else. At that time, we did not address the question of whether or not such conduct by an employer, if found, is an independent tort giving rise to punitive damages.

Paracelsus argues that our holding in *McArn* is not applicable, because *McArn* was decided subsequent to the trial in the case *sub judice*. Yet, *McArn* was a case of first impression, and we applied the employment-at-will exceptions retroactively by remanding *McArn*'s case. Therefore, Paracelsus' argument based on the subsequent determination of *McArn* is not determinative of whether or not it was error to deny a retaliatory discharge instruction.

Clearly, the jury should have been given an instruction on retaliatory discharge. The evidence at trial or, rather, the lack of evidence suggests that Willard and Sumner were fired in retaliation for reporting an illegal act of their employer, *i.e.*, forgery and financial irregularities. Sumner and Olson both testified that the co-signatures on the copies of the checks provided by Willard and Sumner were not theirs. Had the jury been properly instructed on the theory of retaliatory discharge, it is quite conceivable that they would have returned a verdict for Willard and Sumner on this issue. Nevertheless, the jury should have had that option.

The exception to the employment-at-will doctrine sounds in tort, and we recognize, as the majority of jurisdictions do, that a party is entitled to pursue all remedies available in tort, including punitive damages. For example, in *Moniodis v. Cook*, 64 Md. App. 1, 494 A.2d 212, 218 (1985), an employer terminated an employee for refusing to take a polygraph test regarding the amount of inventory in stock. A Maryland law prohibited the requirement of a polygraph test

as a condition to employment. The court held that the employer acted with malice, because it knew of the law, and so ruled that punitive damages were appropriate. Furthermore, the court stated that such damages "beneficially served the punitive and deterrent purposes of exemplary damages." *Id. See also McClung v. Marion County Comm'n*, 178 W.Va. 444, 360 S.E.2d 221, 229 (1987) (punitive damages recoverable for retaliatory discharge where the defendant's conduct was wanton, willful or malicious). *But see Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057, 1063-1064 (5th Cir.1981) (where the Fifth Circuit held that punitive damages could not be recovered by a seaman discharged for filing a personal injury claim against his employer).

Today, we answer in the affirmative the question of whether such conduct, if found, is an independent tort giving rise to punitive damages. The public has a legitimate interest in seeing that people are not discharged for reporting illegal acts or not participating in illegal acts which may result in harm to the public interest. Anyone who terminates an employee for such reasons should be allowed a jury instruction on the issue of punitive damages in order to deter similar future conduct. Discharge in retaliation for an employee's good faith effort to protect the employer from wrongdoing constitutes an independent tort and may support punitive damages.

However, a violation of the public policy exception to the employment at-will doctrine does not per se create a jury issue on the award of punitive damages. It will remain within the purview of the trial court to determine whether this issue should be submitted to the jury. The trial court must decide if "under the totality of the circumstances and viewing the defendant's conduct in the aggregate, a reasonable hypothetical trier of fact could have found either malice or gross neglect/reckless disregard." *Wirtz v. Switzer*, 586

So.2d 775, 783 (Miss. 1991). On remand the trial court may consider the submission of a punitive damages instruction based on the independent tort of retaliatory discharge.

II. DID THE TRIAL COURT ERR BY REFUSING TO GRANT AN INSTRUCTION ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES IF THEY FOUND A TORTIOUS BREACH OF CONTRACT?

Willard and Sumner contend that it was error for the trial court to deny an instruction for punitive damages based on tortious breach of contract. The Court has repeatedly stated that punitive damages are recoverable for breach of contract when such breach is attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort. *Peoples Bank and Trust Co. v. Cermack*, 658 So.2d 1352, 1361 (Miss. 1995); *Eselin- Bullock & Associates Ins. Agency, Inc. v. National General Ins. Co.*, 604 So.2d 236, 240 (Miss. 1992); *Strickland v. Rossini*, 589 So.2d 1268, 1273 (Miss. 1991); *Fought v. Morris*, 543 So.2d 167, 173 (Miss. 1989).

The basis for Willard's and Sumner's contentions is that Revel breached the hospital's employment handbook concerning disciplinary procedures. Specifically, they assert that Revel's refusal to recognize the existence of the handbook and its termination procedures rose to the level of a tortious breach. Paracelsus maintains that the trial judges' rulings should be upheld because this is not an extreme case as required by law when considering an award of punitive damages.

Both trial judges ruled that this was not a punitive damages case. In the Sumner case, the trial judge recognized that Revel failed to acknowledge the handbook, however, upon considering the totality of the circumstances, he found this not to be a punitive damages case. The standard of review regarding the refusal of a requested jury instruction

was pronounced in *Hill v. Dunaway*, 487 So.2d 807, 809 (Miss. 1986):

> [O]ur rule is this: [t]he refusal of a timely requested and correctly phrased jury instruction on a genuine issue of material fact is proper only if the trial court—and this Court on appeal—can say, taking the evidence in the light most favorable to the party requesting the instruction, and considering all reasonable favorable inference which may be drawn from the evidence in favor of the requesting party, that no hypothetical reasonable jury could find the facts in accordance with the theory of the requested instruction.

(citations omitted)

The juries in these cases found that Paracelsus 1) discharged Willard in violation of the verbal contract with her as supplemented by the handbook, and 2) discharged Sumner in violation of her contract as supplemented by the handbook and the policies and procedural manual.

Considering the evidence and the jury's special findings, it is possible that the jury could have found that this breach of contract was an intentional wrong committed by Paracelsus. Willard and Sumner had outstanding personnel files. They were terminated on questionable grounds, and the policies of the handbook were not followed in the process. The uncontradicted evidence indicates that Revel wrote checks out to herself and either forged co-signatures or had someone else do so. The backup documents were allegedly stolen and there was no record of these checks or what purpose they served. Willard and Sumner reported what they believed were financial irregularities and were subsequently discharged or constructively discharged. Paracelsus did not follow the contractually stated procedures for the corresponding offenses of Willard and Sumner but even more outrageous is their subsequent termination in view of

impeccable personnel records. It is possible that a reasonable jury could find an intentional wrong here necessitating the imposition of punitive damages. The trial courts may reconsider submitting a punitive instruction to the jury on this basis as well.

III. DID THE TRIAL COURT ERR BY DENYING WILLARD'S AND SUMNER'S POST TRIAL MOTIONS FOR ATTORNEY'S FEES?

Willard and Sumner both filed a motion for award of attorney's fees in the trial court. The motions set out three reasons for their entitlement to attorney's fees: 1) Such fees are a reasonably foreseeable result of Paracelsus' conduct in breaching the employment contract, 2) Paracelsus filed a frivolous motion to compel counsel to withdraw, which was unsupported by any evidence, and 3) Paracelsus needlessly protracted the litigation by failing to file an answer timely and Willard and Sumner were successful on their motion to compel under M.R.C.P. 37. The trial courts denied the respective motions.

Willard's and Sumner's claim that under traditional tort principles they should be entitled to recover all of their damages which include attorney's fees is not the law in Mississippi. Repeatedly, the Court has followed the American rule that when there is no contractual provision or statutory authority providing for attorney's fees, they may not be awarded as damages unless punitive damages are proper as well. *Stokes v. Board of Directors of La Cav Imp. Co.*, 654 So.2d 524, 529 (Miss. 1995); *Century 21 Deep South Properties, Ltd.. v. Corson*, 612 So.2d 359, 375 (Miss. 1992); *Central Bank of Mississippi v. Butler*, 517 So.2d 507, 512 (Miss.1987). The Court, though, has held that attorney's fees are recoverable as an element of damages in a few situations. *See Greenlee v. Mitchell*, 607 So.2d 97, 109 (Miss. 1992); *Howard v. Clanton*, 481 So.2d 272, 276 (Miss. 1985) (interpreting Miss. Code Ann. § 89-1-33 to provide

attorney's fees where a purchaser under a warranty deed incurred expenses adjudicating title). *See also Wirtz v. Switzer*, 586 So.2d 775, 782 (Miss. 1991) (error not to allow jury to consider attorney's fees against defendant accountant when his negligence required executrix to defend against a complaint by heirs).

Other than those cases in which the American rule is applicable, we have allowed attorney's fees only where the wrongful act of the defendant has involved the plaintiff in litigation with others. That is not the situation here. If we were to extend an award of attorney's fees as an element of damages, we would be moving toward the English rule of awarding counsel fees to successful plaintiffs in litigation. This rule we have repeatedly resisted. *See Grisham v. Hinton*, 490 So.2d 1201, 1206 (Miss. 1986).

Willard and Sumner argue that the case of *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290 (Miss. 1992), overrules the limited situations for an award of attorney's fees. Veasley, the beneficiary of a life insurance policy, sued Universal Life for failure to pay the claim. The jury awarded Veasley the balance due on the contract after funeral expenses had been paid, $500 for actual extra-contractual damages and $175,000 in punitive damages. Universal appealed these awards, and the Court reversed and rendered as to the punitive damages issue. The Court upheld the extra-contractual damages based on emotional distress. The Court applied the tort law principle that one is liable for the full measure of the reasonably foreseeable consequences of her actions. Further stating that it was foreseeable by an insurer that failure to pay a valid claim through the negligence of its employees may cause an adverse result to the plaintiff. *Id.* at 295. The Court went on to say, "[a]dditional inconvenience and expense, attorney's fees and the like should be expected in an effort to have the oversight corrected." *Id.* This is the language relied on by Willard and

Sumner. However, Veasley is addressing a problem peculiar to the insurance industry, specifically the lack of proper damages when there is a failure to pay on an insurance contract without an arguable reason, and the circumstances do not warrant punitive damages. Its application should be limited.

It was proper to deny attorney's fees in this instance, because there was no contractual provision or statutory authority nor was there an award of punitive damages. Moreover, there was no litigation between the plaintiffs and a third party. The trial judges did not abuse their discretion on this issue. However, on remand should the punitive damages issue be submitted to the jury and an award granted it follows that attorney's fees should be awarded as well.

Willard and Sumner also contend they are due attorney's fees because of Paracelsus' unsuccessful Motion To Compel Opposing Counsel's Withdrawal Due To Conflict Of Interest. Paracelsus apparently attempted to show that W.O. Luckett, a member of the former firm of Willard and Sumner's attorney, represented Paracelsus on a Worker's Compensation claim. The order of the trial court summarily denied any attorney's fees without making any findings, and neither party designated the transcript of the hearing on appeal. In previous matters, the Court has stated that it will assume the trial judge made determinations of fact sufficient to support his verdict where no specific finding of fact is made. *Love v. Barnett*, 611 So.2d 205, 207 (Miss. 1992); *Walters v. Patterson*, 531 So.2d 581, 583 (Miss. 1988). Therefore, the Court must presume that the ruling of the trial courts as to this contention is correct and affirm the orders, as the record does not support a contrary view.

Willard and Sumner also claim they are entitled to attorney's fees because they were successful on their motions to compel discovery. Apparently, at the hearing on these motions, Willard and Sumner were successful but were

denied their motions for attorney's fees. In the written order, the trial courts summarily denied Willard's and Sumner's motions for attorney's fees. We have held that the award of attorney's fees against the losing party is mandatory under Rule 37(a)(4), unless the trial court finds that the motion to compel was substantially justified, and the award was not unjust. *Barnes v. Confidential Party*, 628 So.2d 283, 292 (Miss. 1993). The standard of review for a trial court's decision on this issue is the familiar abuse of discretion standard. *Id.* The Court will have to assume here that the trial judges made a sufficient determination of justification in their decision, because the transcripts of the hearings were not designated on appeal. Willard and Sumner are appealing the orders of the lower court and they have the burden of seeing that the record before the Court contains all data essential to matters relied upon for reversal. *Shelton v. Kindred*, 279 So.2d 642, 644 (Miss. 1973). As a procedural matter, the better practice for trial courts under Rule 37(a)(4) would be to specifically state in the written order why such motions are substantially justified. However, we will assume in this situation that the trial judges made determinations of fact sufficient to support their verdicts here. *See Love*, 611 So.2d at 207. Accordingly, we affirm the trial judges on this issue.

Conclusion

This case is reversed and remanded for a new trial consistent with this opinion. Willard and Sumner are entitled to a retaliatory discharge instruction. Accordingly, the trial courts may wish to review their rulings on the submission of a punitive damages instruction to the jury.

REVERSED AND REMANDED FOR A NEW TRIAL CONSISTENT WITH THIS OPINION.

PRATHER and SULLIVAN, P.JJ., BANKS, McRAE, JAMES L. ROBERTS, Jr. and SMITH, JJ., concur.

DAN LEE, C.J., and MILLS, J., not participating.

APPENDIX C

IN THE CIRCUIT COURT OF TATE COUNTY, MISSISSIPPI

CAROLYN WILLARD	**PLAINTIFF**
VS.	**CAUSE NO. CV-90-0203-B-T**
PARACELSUS HEALTH CARE CORPORATION	**DEFENDANT**
AND	
BETTIE SUE SUMNER	**PLAINTIFF**
VS.	**CAUSE NO. CV-90-0274-C-T**
PARACELSUS HEALTH CARE CORPORATION	**DEFENDANT**

ORDER

This case is before the Court upon the Motions for Judgments Notwithstanding the Verdicts or Motion for New Trials or Remittiturs filed by the Defendant, Paracelsus Health Care Corporation ("Paracelsus"). The Plaintiffs, Carolyn Willard ("Willard") and Bettie Sue Sumner ("Sumner"), filed a response to Paracelsus' post trial motions and a Motion to Strike Affidavit of Robert M. Starling. Paracelsus subsequently filed a reply to Plaintiffs' Response, and the parties submitted briefs in support of their respective positions. Oral arguments were presented to the Court by counsel for the parties on September 25, 1997, at the Panola County Courthouse in Batesville. At the conclusion of said oral arguments, the Court took this matter under advisement for further study and subsequent ruling. After meticulous

consideration of all the issues presented, the Court is satisfied that, upon the record and the applicable law, Paracelsus' motions must be denied and Willard and Sumner's Motion to Strike Affidavit of Robert M. Starling is granted.

1.

Separate trial juries found for Willard on July 28, 1992, returned a verdict against Paracelsus, and awarded actual damages in the amount of $10,000 and for Sumner on October 23, 1992 in the amount of $35,102. Special interrogatories were submitted to both juries in which they found that Willard's and Sumner's discharges were in violation of their contracts with the hospital as supplemented by the handbook and policy and procedure manual. After an appeal to the Mississippi Supreme Court, the case was reversed and remanded for a new trial consistent with their rulings. See ***Willard v. Paracelsus Health Care Corp.,*** 681 So.2d 539 (Miss. 1996). The Supreme Court ruled that the jury should have been given an instruction on retaliatory discharge. See ***Willard,*** 681 So.2d at 542. This trial court on remand could consider the submission of a punitive damages instruction on the tort of retaliatory discharge. See ***Willard,*** 681 So.2d at 543. This court could also consider submitting a punitive damages instruction on a tortious breach of contract. See ***Willard,*** 681 So.2d at 544. On remand, this Court allowed the jury to consider punitive damages in connection with the claim for wrongful discharge and tortious breach of contract. The jury found for the plaintiffs and awarded $1.5 million in punitive damages each to Willard and Sumner.

In the post-trial motions, Paracelsus argues that the jury should not have been allowed to consider punitive damages in connection with the wrongful discharge or tortious breach of contract, and the verdicts were excessive and against the overwhelming weight of the evidence and were based on passion, prejudice and bias. Paracelsus also attacks the

qualification and competency of the Plaintiffs' financial expert to present testimony because he had no set fee agreement before testifying. Paracelsus argues, alternatively, that if no grant of a j.n.o.v. or a new trial is forthcoming, this Court should at least grant a remittitur due to the financial hardship the verdict will render on Paracelsus. Paracelsus attached to their motions an affidavit of Robert Starling, the Senior Vice President/Controller for Paracelsus.

2.

The appropriate criteria to be applied by trial judges in considering motions for judgment notwithstanding the verdict ("j.n.o.v.") and for new trials has been set out in several cases. This court must test the legal sufficiency of the evidence by considering the evidence in the light most favorable to the non-moving party, giving that party the benefit of all favorable inferences that may be drawn therefrom, and determining if there was substantial evidence to support the verdict. See ***Allen v. Mac Tools, Inc.***, 671 So.2d 636, 645-646 (Miss. 1996).

Motions for JNOV are made pursuant to Rule 50(b) of the Mississippi Rules of Civil Procedure. Motions for a new trial are made pursuant to Rule 59. Under our established case law, the trial judge should set aside a jury's verdict when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence. See ***C & C Trucking v. Smith,*** 612 So.2d 1092, 1099 (Miss. 1992); ***Jesco, Inc. v. Whitehead,*** 451 So.2d 706, 714-17 (Miss. 1984).

When the entire record in this case is considered in light of the applicable case law, the Court concludes, without question, that Paracelsus' motions for j.n.o.v. and new trials must be denied.

3.

Paracelsus argues that if it should fail on its request for a j.n.o.v. or a new trial, it requests that the Court enter a remittitur due to the financial hardship this verdict will render on the Paracelsus corporation.

In considering Paracelsus' motion for a remittitur, this Court must first begin with the applicable statute, MISS. CODE ANN. §11-1-55 (Rev. 1991), which allows this Court to overrule a motion for new trial upon condition of a remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence.

In ***Odom v. Roberts,*** 606 So.2d 114, 118 (Miss. 1992), the Supreme Court stated:

> If there is substantial evidence to support the jury award, or if the award is not so large or inadequate as to shock the conscience of the Court, or is not the result of bias, passion or prejudice on the part of the jury, this Court will not reverse an award of damages. ***Purina Mills, Inc. v. Moak,*** 575 So.2d 993, 997 (Miss. 1990); ***Motorola,*** 555 So.2d at 723. However, if this Court, or any other court of record, "finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence," a motion for a new trial still may be overruled upon condition of additur or remittitur. Miss. Code Ann. § 11-1-55 (Supp. 1990).
>
> 606 So.2d 114, 118.

When keeping in mind that this Court cannot base its decision on what verdict it may have returned as a juror in this case, then the Court reaches the inescapable conclusion

that in the case, *sub judice,* the record and the law requires that the Court leave the amount of the jury verdict undisturbed, notwithstanding the Court's clear authority in appropriate cases to order a remittitur. Certainly, based on the entire record, the Court could not find that

> the damages are excessive. . . for the reason that the jury . . . was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence. See MISS. CODE ANN §11-1-55.

Because this Court is constrained to evaluate the evidence before the jury, no other evidence will be considered in support of the motion for remittitur. Therefore the affidavit of Robert M. Starling will not be considered and should be stricken.

4.

In sum, when considering the record before the Court in this case, and the applicable case law, the Court is constrained to deny Paracelsus' j.n.o.v. motion and new trial motion, as well as Paracelsus' request for a remittitur.

IT IS THEREFORE, ORDERED that the Defendants' Motions for Judgments Notwithstanding the Verdicts or Motion for New Trial or Remittiturs is **DENIED**; and Plaintiffs' Motion to strike affidavit is **GRANTED**.

SO ORDERED this the 14th day of October, 1997.

GEORGE C. CARLSON, JR.
CIRCUIT COURT JUDGE

APPENDIX D

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi

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January 27, 2000

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 27th day of January, 2000.

Supreme Court Case # 97-CA-01494-SCT
Trial Court Case # CV90203

Paracelsus Health Care Corporation v. Carolyn Willard and Bettie sue Sumner

Appellant's motion for rehearing, denied. Prather, C.J., Waller and Cobb, JJ., would grant. Mills, J., not participating.

NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

STATE OF MISSISSIPPI
SUPREME COURT
SEAL

MANDATE
SUPREME COURT OF MISSISSIPPI

To the Tate County Circuit Court – GREETINGS:

In proceedings held in the Courtroom, Carroll Gartin Justice Building, in the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a final judgment as follows:

Supreme Court Case # 97-CA-01494-SCT

Trial Court Case #CV90203

Paracelsus Health Care Corporation v. Carolyn Willard and Bettie Sue Sumner

Consolidated with:
92-CA-00996-SCT
Carolyn Willard v. Paracelsus Health Care Corporation, Paracelsus Senatobia Community Hospital, Inc., Carolyn Revel and Danny Swindle

93-CA-00021-SCT
Bettie Sue Sumner v. Paracelsus Health Care Corporation, Paracelsus Senatobia Community Hospital, Inc., and Carolyn Revel

92-CA-01274-SCT
Bettie Sue Sumner v. Paracelsus Health Care Corporation, Paracelsus Senatobia Community Hospital, Inc., and Carolyn Revel

Thursday, 4th day of November, 1999
Affirmed. Statutory penalties and interest are awarded. Paracelsus Health Care Corporation taxed with all costs of this appeal.

Thursday, 27th day of January, 2000
Appellant's motion for rehearing, denied. Prather, C.J., Waller and Cobb, JJ., would grant. Mills, J., not participating.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

WITNESS, the Honorable Lenore L. Prather, Chief Justice of the Supreme Court of Mississippi; also the signature of the Clerk and the Seal of said Court hereunto affixed, in the City of Jackson, on February 3, 2000, A.D.

s/Charlotte B. Williams
Clerk